UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte NOBUHIKO HONMA,
JOHN GREGORY SCHROEDER, and
ANASTACIA ROSARIO ARICAYOS BARANGAN,
Appellants

Appeal 2007-2555
Application 09/862,869[1]
Technology Center 1700

Decided: November 30, 2007

Before TEDDY S. GRON, CAROL A. SPIEGEL, and MARK NAGUMO, *Administrative Patent Judges.*

SPIEGEL, *Administrative Patent Judge*.

DECISION ON APPEAL

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[1] Application filed 22 May 2001 ("the '869 Application"), claiming the benefit of priority to Provisional Application 60/206,076, filed 22 May 2000. The real party-in-interest is said to be The Procter & Gamble Company (Appeal Brief filed 21 August 2006, as amended 11 October 2006 ("Br.") at 1).

INTRODUCTION

This is an appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1-39, all of the claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

THE SUBJECT MATTER ON APPEAL

The subject matter on appeal is directed to methods of using combinations of various known laundry treatment products to care for a fabric article while minimizing undesirable results. For example, a combination of detergent and chlorine bleach typically cleans a white cotton fabric but fades or decolorizes a black cotton fabric due to the noncolorsafe chlorine bleach. In particular, the subject matter on appeal requires the combination of laundry treatment products used to have a common marketing or "coordinating" element, e.g., the same brand name, same container graphics, or same containers, to induce consumer behavior. According to Appellants' specification, this common element is said "to facilitate consumer recognition, reduce consumer confusion and increase ease of use" (Specification at 18:31 through 19:2). Claim 1 (Br. at 8, emphasis added) is representative and reads as follows:

> 1. A method for caring for a fabric article comprising the steps of:
>
> providing a laundry detergent composition comprising a set of laundering instructions;
>
> providing a fabric treatment composition comprising a set of fabric treatment instructions, the fabric treatment composition being selected from the group consisting of a bleaching composition, a color maintenance composition, a dryer sheet composition, a finishing composition, a pre-treating composition, and a combination thereof;
>
> laundering a fabric article with the laundry detergent composition; and

treating the fabric article with the fabric treating composition,

wherein the set of laundering instructions comprise a laundering recommendation to use the laundry detergent composition in combination with the fabric treatment composition, wherein the set of fabric treatment instructions comprise a fabric treatment recommendation to use the fabric treatment composition in combination with the laundry detergent composition; and wherein the fabric treatment composition and the laundry detergent composition possess one or more coordinated elements selected from a brand name, container graphics, containers, the dosages per container, a dye, a perfume, a trade dress, and combinations thereof.

THE REJECTIONS

The Examiner relies on the following references of record as evidence of unpatentability:

Dedrick US 5,710,884 Jan. 20, 1998

Florman and Florman ("Florman"), "Laundry" in CONSUMER REPORTS BOOKS HOW TO CLEAN PRACTICALLY ANYTHING, third edition/updated (December 1994) at 80-84, 95-97 and 110-111.

Appealed claims 1-4, 6-10, 12-16, 18-22, 24-32, and 34-39 stand rejected under 35 U.S.C. § 102(b) as anticipated by or, alternatively, under 35 U.S.C. § 103(a) as obvious over Florman. Appealed claims 5, 11, 17, 23, and 33 stand rejected under 35 U.S.C. § 103(a) as obvious over Florman in view of Dedrick.[2] [Ans.[3] at 4 and 8.]

Appellants argue that Florman does not teach or suggest all of the elements of claim 1. According to Appellants, "there is absolutely no

[2] The Examiner withdrew the final rejection of claims 5, 11, 17, 23, and 33 under 35 U.S.C. § 103(a) as obvious over Florman in view of Yourick (US 4,775,935) in the Answer at 3.

[3] Examiner's Answer ("Ans.") mailed 1 February 2007.

disclosure [in Florman] whereby the fabric treatment composition and the laundry detergent composition possess one or more coordinated elements selected from a brand name, container graphics, containers, the dosages per container, a dye, a perfume, a trade dress, and combinations thereof" (Br. at originally filed 3 and 5; bracketed text added). Further according to Appellants, Dedrick does not cure the defects of Florman (Br. at orginally filed 5). Appellants do not provide separate patentable arguments for any of claims 2-39. Arguments not raised in the brief are considered waived. Thererefore, we decide this appeal on the basis of claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

FINDINGS OF FACT ("FF")

The following findings of fact are supported by a preponderance of the evidence of record.

A. The '869 specification

[1] According to Appellants' specification, it is known to clean a fabric article using a combination of a laundry detergent and one or more fabric treatment compositions, such as a fabric softener, a stain pre-treater, starch, etc. ('869 Specification at 1:17-21).

[2] The large number of separately available laundry detergents and fabric treatment compositions is said to generate an immense number of possible combinations for use in fabric care ('869 Specification at 1:22-32).

[3] Ascertaining which combinations of detergent and fabric treatment compositions provide the best results for a given fabric is said to be too daunting and expensive a task for a consumer ('869 Specification at 1:32 through 2:2).

[4] Moreover, certain combinations of detergent and fabric treatment compositions are said to be incompatible, e.g., a combination of an anionic surfactant and a cationic fabric softener ('869 Specification at 2:3-8).

[5] Further according to Appellants' specification, the hair care industry has addressed these types of problems "by developing hair care systems and methods for treating hair which provide a plurality of products which may synergistically work together to provide a better hair care result" ('869 Specification at 2:9-11).

[6] The claimed invention seeks to apply the coordinated approach used in the hair care industry to the fabric care industry ('869 Specification at 2:13-14).

[7] Still further according to Appellants' specification, since laundry detergents and fabric treatment compositions may be either sold together, i.e., on the same store shelf or product display, or separately, i.e., in different locations in the same or different stores, it is desirable to "coordinate" members of a fabric care system by means of brand name, a characteristic ingredient, container graphics, containers, dosages per container, trade dress, etc. ('869 Specification at 18:28 through 19:2).

[8] In one embodiment, a liquid detergent, a liquid fabric softener, and a solid pre-treatment stain removal composition may be sold together as a fabric care kit with instructions for use ('869 Specification at 19:29-35).

[9] In another embodiment, the components of a fabric care system are provided in containers having a similar construction, the same brand

name, almost identical graphics, similar colors, and similar fragrances ('869 Specification at 20:28-35).

[10] In still another embodiment, coupons may be provided which offer a discount when at least two components of a fabric care system are purchased together ('869 Specification at 21:28-34).

Other findings of fact follow below.

ANTICIPATION

Claimed subject matter is anticipated if "each and every limitation is found either expressly or inherently in a single prior art reference." *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, 246 F.3d 1368, 1374 (Fed. Cir. 2001). The doctrine of inherency may not be used to establish anticipation unless a prior inherency can be established as a certainty. Probabilities or possiblities will not be sufficient to establish an inherent event. *Continental Can Co. U.S.A., Inc. v. Monsanto, Co.*, 948 F.2d 1264, 1269 (Fed. Cir. 1991).

Claims 1-4, 6-10, 12-16, 18-22, 24-32, and 34-39 stand rejected under § 102(b) as anticipated by Florman (Ans. at 4).

[11] Florman discloses fabric care instructions, e.g., sorting by color, pretreating stains before washing, fastening zippers before washing to prevent snags, using garment manufacturer's "care label" as a guide, and using bleaches, detergents, boosters, softeners and washing machines to cope with a pile of dirty laundry (Florman at 80-81).

[12] Florman discusses the differences between chlorine and non-chlorine bleaches and recommends using chlorine bleach when necessary, as indicated by the garment's care label, avoiding use on wool, silk, mohair or noncolorfast fabrics and never with ammonia or toilet

cleaners because the combination can produce deadly fumes (Florman at 81-83).

[13] According to Florman's "Ratings of Laundry Boosters" table, stain-fighting boosters varied in their effectiveness to help remove different types of stains (Florman at 85).

[14] Further according to Florman, boosters "may contain many of the same ingredients as detergents", including fluorescent dyes (Florman at 83).

[15] Florman also discuss as the relative advantages and disadvantages of liquid softener versus dryer sheets, of using a combination of softeners and detergents in one composition or in sequentially combined , convenient laundry products, and how to coordinate their use (Florman at 97 and 110-111).

[16] For example, combination detergent-softeners are added to the laundry at the start of the wash cycle, liquid softeners are added to the final rinse, and dryer sheets are tossed into the dryer with the wet laundry (Florman at 110).

[17] According to Florman, "[m]akers of laundry products include fragrances partly because someone at the company thinks consumers like them and partly to hide the smell of other chemical ingredients" (Florman at 111).

[18] However, Florman notes that since some people cannot tolerate any fragrance for aesthetic or allegeric reasons, several detergents and fabric softeners, which "typically sport names that end in 'free'," promote their lack of additives.

[19] Moreover, according to Florman, "there is little correlation between price and cleaning ability" so "[y]ou can save the most money by forgetting brand loyalty: Clip coupons and stock up on whatever satisfactory product is on sale" (Florman at 97, "PRICES").

[20] The Examiner finds that Florman teaches that each step in each of the claims is notoriously well known and that each marketed garment comes with a fabric care label (Ans. at 5).

[21] In particular, the Examiner finds that Florman teaches the coordinated elements limitation of the claimed invention, i.e., "that boosters and detergents do generally contain the same coordinated elements such as characteristic ingredients and dyes" (Ans. at 6, emphasis added).

[22] The Examiner further finds that Florman teaches the sequence in which detergents and softeners are used (FF 16; Ans. at 8).

The Examiner equates Florman's teaching of the sequence in which detergents and softeners are used with teaching a recommendation that a particular detergent and softener be used together because they both have a common brand name, container graphics, containers, dosage per container, dye, perfume, and/or trade dress (Ans. at 6, 7, and 10-11).

The fatal flaw in the Examiner's anticipation rejection is a failure to establish that Florman recommends using a detergent together with another fabric treatment, e.g., a softener, because they both have a common brand name, container graphics, containers, dosage per container, dye, perfume, and/or trade dress as required by claim 1. The Examiner also fails to establish that a coordinating element is necessarily present in boosters and detergents used in combination to clean dirty laundry as required by the claimed invention. "Generally" does not equate to "necessarily." Therefore,

we must REVERSE the rejection of claims 1-4, 6-10, 12-16, 18-22, 24-32, and 34-39 as anticipated by Florman.

OBVIOUSNESS

A claimed invention is not patentable if the subject matter of the claimed invention would have been obvious to a person having ordinary skill in the art. 35 U.S.C. § 103(a); *KSR Int'l Co. v. Teleflex, Inc.,* 127 S.Ct. 1727 (2007); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966). Facts relevent to a determination of obviousness include (1) the scope and content of the prior art, (2) any differences between the claimed invention and the prior art, (3) the level of ordinary skill in the art, and (4) objective evidences of obviousness or non-obviousness. *KSR*, 127 S.Ct. at 1734; *Graham*, 383 U.S. at 17-18.

Claims 1-4, 6-10, 12-16, 18-22, 24-32, and 34-39 stand rejected under § 103(a) as obvious over Florman.

According to the Examiner, given the broad teachings of Florman of providing and using detergents and fabric treatment compositions, e.g., softener, in combination and in sequence to care for fabric articles, the claimed method would have been obvious to one of ordinary skill in the art (Answer at 7-8). Further according to the Examiner, Florman teaches that softeners and detergents generally contain coordinated elements, e.g., characteristic ingredients and dyes (Answer at 11).

Appellants have raised two critical issues. First, would it have been obvious to a person of ordinary skill to use a detergent and another fabric treatment composition, e.g., bleach or softener, together because they both have a common brand name, container graphics, containers, dosage per container, dye, perfume, and/or trade dress?

Appellants argue that Florman does not teach or suggest "products having the elements claimed in the invention" (Br. at 5).

Florman, however, teaches "coordinated elements," e.g., that boosters and detergents may contain common ingredients, including fluorescent dyes (FF 14).

Appellants also argue that Florman does not teach or suggest "methods of caring for a fabric article utilizing the coordinating elements as disclosed by the present invention" (Br. at 5). Appellants repeatedly argue that Florman does not recognize the need for coordinated elements to facilitate customer recognition, reduce customer confusion, and increase ease of use, and teaches away from certain claimed coordinated elements, e.g., brand names and perfume (see e.g., Br. at 6).

> In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under § 103. *KSR*, 127 S.Ct. at 1741-42.

As noted by the Examiner (Ans. at 9), Florman fairly suggests that consumers look for their personal preferences on laundry product packaging. For example, some consumers are said to prefer a particular perfume fragrance (e.g., white lilac scent), while others steer away from any fragance at all (FFs 17-18). Moreover, Florman's teaching that some consumers will not use perfume-containing laundry products, whether because they dislike the fragrance or are allergic to the perfume, is not a teaching away from the claimed invention since the "coordinated elements" of the claimed invention are not limited to perfumes; and, because "perfume-free" indications on containers of detergent compositions and fabric treatment compositions are

part of the trade dress of a product. Similarly, insofar as Florman teaches against using chlorine bleach on noncolorfast fabrics (FF 12) and analogous to its teaching of "free" products (FF 18), Florman fairly suggests using laundry products having "coordinated" container graphics marked as "chlorine-free" or "safe for colorfast fabrics." Florman also fairly suggests that a number of customers use laundry products based on brand loyalty (FF 19; Answer at 11-12).

It is well settled that the prior art need not disclose the same purpose or benefits of a claimed method in order to establish its obviousness under 35 U.S.C. § 103. *In re Dillon*, 919 F.2d 688, 693 (Fed. Cir. 1990).

Based on the foregoing, we AFFIRM the rejection of claims 1-4, 6-10, 12-16, 18-22, 24-32, and 34-39 under § 103(a) as obvious over Florman. Since, the patentability of claims 5, 11, 17, 23, and 33 stand or fall with the patentability of claim 1, we also AFFIRM the rejection of claims 5, 11, 17, 23, and 33 under § 103(a) as obvious over Florman in view of Dedrick.

The Supreme Court also stated in *KSR*, 127 S.Ct. at 1740, that

> When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

The *KSR* decision was handed down after the Brief and the Answer were entered into this record. We note in passing that, according to the '869 specification, the claimed invention seeks to apply the coordinated approach used in the hair care industry to the fabric care industry (FFs 5-6).

CONCLUSION

Upon consideration of the record and for the reasons given, it is

ORDERED that the Examiner's rejection of claims 1-4, 6-10, 12-16, 18-22, 24-32, and 34-39 as unpatentable under 35 U.S.C. § 102(b) over Florman is REVERSED;

FURTHER ORDERED that the Examiner's rejection of claims 1-4, 6-10, 12-16, 18-22, 24-32, and 34-39 as unpatentable under § 103(a) as obvious over Florman is AFFIRMED;

FURTHER ORDERED that the Examiner's rejection of claims 5, 11, 17, 23, and 33 as unpatentable under 35 U.S.C. § 103(a) as obvious over Florman in view of Dedrick is AFFIRMED; and,

FURTHER ORDERED that no time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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